



Cape Cod Cranberry Growers' Association

GROWER ADVISORY

Understanding the Federal Clean Water Act

Background

Section 404 of the Federal Clean Water Act regulates activities that involve the discharge of dredged or fill material into wetlands and other waters of the United States. The United States Army Corps of Engineers (Corps) has the permitting responsibility for these activities. This grower advisory discusses how cranberry bog management practices interface with the Clean Water Act. Although state and federal wetland regulations attempt to be similar, there are differences between the regulations. It is important for growers to be aware that practices that may be exempt under state wetlands law (Wetlands Protection Act) may not necessarily be exempt under the federal Clean Water Act regulations. The United States Environmental Protection Agency is responsible for enforcing violations of Section 404 of the Clean Water Act when no permit has been obtained.

For Massachusetts specific regulations regarding working in wetlands, please see the grower advisory titled "Agriculture Regulations of the Wetlands Protection Act." The state Wetlands Protection Act comes under the regulatory authority of MassDEP and your local conservation commission. This advisory will focus only on the federal Clean Water Act.

Exempt vs. Unregulated Activities

Unregulated: Activities which do not involve filling (discharges of dredged or fill material) in wetlands and other waters or occur entirely outside of the wetlands and waters of the United States. Generally these are activities occurring on upland soils.

Exempt: Activities which relate to ongoing, established cranberry operations and may involve some potential filling in existing producing cranberry bogs, agricultural work within land in agricultural use (such as existing reservoirs, dikes, sand pits) or agricultural projects occurring entirely in upland soils.

Unless the Corps has determined that an activity is exempt, a Section 404 permit will be required for an activity that would convert wetlands or other waters to a new use (i.e. convert a wetland to a bog), reduce the reach or impair the flow or circulation of the wetlands or waters or where the activity would drain or modify a stream, lake, swamp, etc.



GO:

Unregulated Activity, No Permit Required Provided Conditions Are Met

The following activities require no permits or notification of federal authorities (Corps) provided that they occur within the confines of an existing, producing cranberry bog* OR there is no filling or discharge of fill into wetlands OR they occur entirely on upland soils.

- Brush Cutting/Tree Cleaning
- Burning
- Sand Pit Construction or Maintenance
- Flooding & Flood Release
- Fertilizer & Pesticide Applications**
- Gate & Fence Construction
- Harvesting
- Construction & Maintenance of Accessory Buildings (includes shops, barns)
- Maintenance of Pump Houses
- Mowing
- Pollination
- Vine Pruning
- Squaring Off Bogs (in uplands)
- Regulating Water Flow

* If the bog you intend to farm has been inactive for a period of time, before proceeding with any activities, be sure to contact the Corps for a determination of whether the bog is considered active (see the Grower Advisories titled “Working with Bogs in Disrepair” and “Abandoned Bog Renovation” for more information).

** For growers with 80 acres or more, you may be subject to the US EPA NPDES Pesticide General Permit, contact CCCGA for details.



GO:

Exempt Project, No Permit Required Provided Conditions Are Met

These projects are exempt from federal permitting, provided that they occur within the confines of an existing, producing cranberry bog or other cropland OR are conducted within upland soils. In either situation, there can be no fill to wetlands or other regulated waters outside of the confines of the bog, except incidental fallback fill during the course of the project. It is always a good practice for a grower to confirm an exemption with the Corps. If your project is being conducted as part of your conservation farm plan, any questions should be directed to your local NRCS service center.

- Bypass Canal Construction (not impacting wetlands or other regulated waters; no fill can enter the existing wetland/water when connecting the canal)
- Bypass Canal Cleaning and Maintenance
- Cleaning and Dredging Reservoirs and Farm Ponds
- Dike Construction (within a bog)
- Dike Construction (outside a bog, not impacting wetlands or other regulated waters)
- Ditch Cleaning
- Installing Drainage (within a bog)
- Irrigation System Improvements
- Pond Construction (not impacting wetlands or other regulated waters)
- Pump House Construction (not impacting wetlands or other regulated waters)
- Rebuilding Existing Dikes and Flumes
- Renovating Active Bogs (within existing dikes)
- Road Construction (not impacting wetlands or other regulated waters)
- Road Maintenance
- Sanding



CAUTION:

Not Exempt, Some (but not all) Projects Require Written Notification

Projects that are not determined to be exempt from federal regulations, fall under the Massachusetts Programmatic General Permit (MA PGP), administered by the Corps.

The MA PGP is a permit document for Category 1 activities. If a project is going to result in some fill (less than 5,000 square feet), other than incidental fallback, to wetlands or other regulated waters, than it is considered a Category 1 activity. Projects that growers need to be cautious of before undertaking all occur outside of the confines of active cranberry bogs.

Examples of grower activities that may trigger notification include Bypass Canal Construction and Exterior Dike Construction. Any project that meets the criteria above requires you to submit Appendix C (Category 1 Self-Certification Checklist) from the MA PGP to the Corps before proceeding. The Self-Certification Checklist must be submitted to the Corps at least 30-days prior to starting work.

However, the following two projects do not require notification (Self-Certification Checklist) to the Corps, provided the following conditions are met.

Pond Construction: The farm pond must fit the scale (relative size) of the farming operation, has not been part of the farming operation in the past and any of the dredged materials are not being placed in other wetlands.

Road Construction: Built in accordance with BMPs, minimal impact to aquatic environment, minimal size needed, no erosion into surrounding water body, no take or adverse effect on endangered species, no impact to breeding and nesting areas for migratory wildfowl, spawning areas, or wetlands and not in part of the National Wild and Scenic River System.

To meet the requirements as a Category 1 project, the current proposed fill activity added to any past fill amount must not exceed 5,000 square feet for the property. Category 1 fill activities are subject to the exceptions or conditions that are described within the MA PGP document. The MA PGP can be found on the Corps' web site at <http://www.nae.usace.army.mil/reg/index.htm>. Once there, click on the word "Massachusetts" for a PDF file of the permit. Any work that exceeds the Category 1 level of temporary and/or permanent fill or triggers any of the other exclusions from Category 1 will require a formal application be filed with the Corps. The MA PGP expires and is renewed with new conditions every 5 years.

It is often advisable to establish whether a project is exempt from permitting by receiving a determination from the Corps before starting your project.



STOP:

Not Exempt, Projects Require an Application and Written Approval

If any project involves discharge of permanent or temporary fill in excess of 5,000 square feet into a wetland or other regulated water that is outside of the confines of an existing producing cranberry bog, it requires a permit under Section 404 of the Clean Water Act from the Corps. Examples of projects that would trigger a permit include new dike construction in a wetland, filling in a section of active cranberry bog and bypass canal construction going through a wetland. In general, if the project impacts less than 1 acre, it will be considered a Category 2 project; if the project impacts greater than 1 acre, than an Individual Permit will be required from the Corps.

If a grower knows that a permit is going to be required for a project, they can receive free guidance from the Corps by submitting basic information on the project before finalizing plans. The Corps would then advise the applicant as to the next steps in the process and what additional information will be required. For large projects, the Corps also offers a pre-screening process with other regulatory agencies, which helps to define permitting needs and potential issues prior to final plans being drawn and submitted.

Projects that do require permitting under the Clean Water Act, often trigger the need for other federal, state and local approval. It should also be noted that even exempt projects do not preclude notification or approvals from other regulatory agencies in some instances. This advisory does not detail those processes but it is important for growers to be aware that there other regulations to consider. These additional approvals and/or notifications may include a Section 401 Water Quality Certificate (MassDEP), Notice of Intent (local conservation commission), Massachusetts Environmental Policy Act (MEPA), Wetland Conservation Provisions under the Food Security Act (NRCS), federal Wild and Scenic Rivers Act, Massachusetts Historical Commission, Endangered Species Act (Natural Heritage and Endangered Species Program), Coastal Zone Management, Native American Tribe notification, among others.

Summary

In general, projects that are occurring within the confines of an active, working cranberry bog and are normal farming practices, do not require notification or permitting from the Corps. Similarly, normal farming projects that are occurring on land in agricultural use or uplands and do not impact wetlands or other regulated waters, also do not require notification or permits from the Corps. If an activity is occurring outside of the confines of an active cranberry bog and is impacting less than 5,000 square feet of wetland, than notification to the Corps prior to starting work is required. Pond and road construction activities are exempt from notification, with conditions. If an activity is occurring outside of the confines of an active cranberry bog and is impacting more than 5,000 square feet of wetland, than notification and written approval from the Corps is required.

The information in this guide is provided by the Cape Cod Cranberry Growers' Association as a service to its members. The information represents our interpretation of the federal requirements and by no means is intended to act as a substitute for reading and following the specific regulatory requirements.

The Clean Water Act may be viewed in its entirety by consulting the
Federal Water Pollution Control Act
33 U.S.C. 1251 et seq.

Section 404 of the Clean Water Act (33 U.S.C. 1344) can be viewed at
<https://www.epa.gov/cwa-404/clean-water-act-section-404>

The **Massachusetts Programmatic General Permit** can be found on the Corps' web site at
<http://www.nae.usace.army.mil/Missions/Regulatory/State-General-Permits/>
click on the word "Massachusetts"

Note: An activity that is exempt from the Clean Water Act may be subject to regulation under other state or federal laws.

For more information, please contact:

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